Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RICHARD SULLIVAN,

Petitioner,

v.

RIVER VALLEY SCHOOL BOARD; RIVER VALLEY EDUCATION ASSOCIATION; CHARLES O. WILLIAMS, Superintendent for River Valley Schools; PHIL BENDER, President of River Valley Education Association; JANE TEMPLE, GARY B. SOMMERS, PAMELA BEHNKE, DENNIS ZEIGER, RICHARD RIETH, VICKIE PAILING, LYNDA VACKAR and WESLEY LIND, jointly and severally in their individual and official capacities,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the state courts of Michigan have adopted, and are following, a rule of interpretation regarding Free Speech claims under 42 U.S.C. § 1983, which is in conflict with current federal court interpretations on the issue of what constitutes a matter of public concern.

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JURISDICTIONAL STATEMENT

Petitioner seeks review of the decision of the Court of Appeals affirming the Lower Court's dismissal of plaintiff's case in its entirety, pursuant to Supreme Court Rules Chapter III §10. Petitioner filed an Application for Leave to Appeal the order of the Court of Appeals, which was denied by the Michigan Supreme Court on June 29, 1999.

The jurisdiction to review the judgment of the Michigan Supreme Court is pursuant to 28 U.S.C. §2101 and Supreme Court Rules Chapter III §10.

STATUTORY AND CONSTITUTIONAL PROVISION

42 U.S.C. §1983 Civil action for deprivation of rights states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution

Amendment I states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Lower Court Proceedings

1. In this action, Appellant alleged, among other things, that Appellees denied him his constitutional right to free speech, due process, and equal protection under 42 U.S.C. §1983.

2. A Motion for Summary Disposition Hearing was held on September 7, 1993 before the Hon. Ronald J. Taylor.

3. On February 16, 1994, the lower court granted Appellees River Valley School Board (hereinafter "RVSB"), Charles O. Williams, and the individual Board members' Motion to Dismiss. The Order summarily dismissed Appellant's claim of defamation, intentional infliction of emotional distress, interference with a contract, false light invasion of privacy, and the constitutional claims of free speech, due process, and equal protection.

4. On March 15, 1994, the lower court granted Appellees Phil Bender and the River Valley Education

Association's (hereinafter "RVEA") Motion to Dismiss. The Order dismissed Appellant's claim of defamation, interference with a contract, and false light invasion of privacy. As to Appellant's remaining claims of intentional infliction of emotional distress, violation of Appellant's constitutional rights of free speech, due process, and equal protection, the lower court denied Appellees' Motion for Dismissal. However, the lower court granted leave to renew Appellees Phil Bender and RVEA's motion at the conclusion of discovery.

5. On December 13, 1994, the Hon. Ronald Taylor entered a final order granting Appellees Bender and RVEA's Amended Renewed Motion for Summary Disposition and dismissed Appellant's remaining claims. Therefore, all of Appellant's claims were summarily dismissed at this point as to all Appellees.

6. On December 30, 1994, Appellant filed his Claim of Appeal, appealing the lower court's summary dismissal of all of his claims.

7. On July 11, 1997, the Court of Appeals issued its unpublished opinion in the above entitled case.

8. The Court of Appeals affirmed the lower court's dismissal of Appellant's claims.

9. On August 1, 1997, Appellant filed his Motion for Rehearing.

10. On September 25, 1997, the Court of Appeals entered an Order denying Appellant's Motion for Rehearing.

11. On October 15, 1997, Appellant filed his Application for Leave to Appeal with the Michigan Supreme Court.

12. On September 15, 1998, the Michigan Supreme Court entered its Order remanding for reconsideration in light of *Chappel v. Montgomery County Fire Protection District No. 1, et al.*

13. On October 8, 1998, Appellant filed his motion to supplement in light of *Chappel v. Montgomery County Fire Protection District No. 1, et al.*

14. On October 28, 1998, the Court of Appeals denied Appellant's Motion to supplement previous filings in light of *Chappel v. Montgomery County Fire Protection District No. 1, et al.*

15. On November 6, 1998, the Court of Appeals entered its Opinion and Order, affirming the dismissal of Appellant's claims under 42 U.S.C. §1983.

16. On November 25, 1998, Appellant filed his Application for Leave to Appeal with the Michigan Supreme Court.

17. On June 29, 1999, the Michigan Supreme Court denied application for leave to appeal.

B. Statement of Facts

Richard Sullivan is a teacher for the River Valley School District, where he has taught since 1977. He was suspended for approximately two years, but has now returned to his teaching position. Mr. Sullivan contends

that his suspension grew out of a series of civil rights violations, including his right of free speech.

Mr. Sullivan had been openly critical of both the Board and the Union, and at public meetings encouraged others in attendance to closely scrutinize the actions of the Board. While it is true that these challenges to the public also dealt with matters involving personal grievances Mr. Sullivan had with the Board and the Union, he claimed that the Board and the Union were involved in illegal contracting and that the public should carefully monitor the Board, as they were elected by the public. Mr. Sullivan and members of the Board traded accusations in the local newspaper concerning the issue of illegal contracting. On November 8, 1990, Mr. Phil Bender, President of the River Valley Education Association, sent a letter to the executive board admitting that the July 2 agreement was "illegal". The Union membership later rejected the letter of agreement.

Another issue of public concern involved the agency shop. Mr. Sullivan criticized the District and claimed that it was not following Supreme Court guidelines concerning agency shop representation fees. He argued this point in letters and in statements to the Board and attempted to get a public hearing to air these issues. It did affect him personally, because he was objecting to being a member of the Union, but it also affected other members, and the parameters set by this Court in agency shop representation fee situations as set out in *Chicago Teachers v. Hudson*, 475 U.S. 292, 302-303 (1986). Mr. Sullivan had been critical and ended his Union membership, electing only to pay agency fees under protest. Even though Mr. Sullivan contends that he paid his agency fees in accordance with

directives provided by the MEA in Lansing, he contends that, in violation of his civil rights and to punish him for speaking out on this matter, the Board and the Union conspired together in an effort to discipline and attempt to terminate him from his position, falsely claiming that he had not paid the agency fees.

On June 22, 1992, at a Board meeting, Jane Temple, the Chairman of the River Valley School Board, read a letter to the Board and to the public containing numerous disparaging statements specifically directed at Mr. Sullivan, accusing him of unprofessional and unethical conduct.

Throughout this dispute, the Union and the Board were criticized openly and publicly by Mr. Sullivan in the press and they in turn traded accusations concerning him. The Lower Court in its Opinion of the Court, 2/14/94 pg. 14 referred to this as a "street brawl". Mr. Sullivan filed a lawsuit in state court contending, in part, that his rights under 42 U.S.C. §1983 had been violated because he was being punished and conspired against by the Defendants for exercising his First Amendment rights to be critical of the Board and of the Union in public. Before any meaningful discovery had taken place the court dismissed the River Valley School Board, its Superintendent and all of the individual Board members on February 16, 1994. After discovery, on March 15, 1994, the Lower Court dismissed some of the claims against Phil Bender, the President of the River Valley Education Association, and the River Valley Education Association, but denied the Motion to Dismiss the constitutional rights of free speech, due process and equal protection. On December 13, 1994, the Lower Court entered a final Order

dismissing all of Plaintiff's claims which had not yet been dismissed.

Appellant timely filed his appeal and the Court of Appeals affirmed the Lower Court on July 11, 1997. From this action, Mr. Sullivan requested a rehearing, which was denied, and Appellant filed his Application with the Michigan Supreme Court for leave to appeal.

The Michigan Supreme Court remanded the case for reconsideration in light of *Chappel v. Montgomery County Fire Protection District No. 1*, 131 F.3d 56 (CA 6, 1997) and following this action Appellant sought leave to supplement his Court of Appeals record in light of *Chappel*, but the Court of Appeals denied Appellant's motion to supplement previous filings and, again, on November 6, 1998, entered its Opinion and Order affirming the dismissal of Appellant's claims under 42 U.S.C. §1983. Appellant sought leave to appeal with the Michigan Supreme Court, which leave was denied. Appellant seeks relief from this court through this Writ of Certiorari.

REASON FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT'S DISMISSAL OF APPELLANT'S FREE SPEECH CLAIM UNDER 42 U.S.C. §1983 AFTER REMAND FOR RECONSIDERATION IN LIGHT OF CHAPPEL V. MONTGOMERY COUNTY FIRE PROTECTION DISTRICT NO. 1, 131 F.3d 56 (CA 6, 1997) AND THE MICHIGAN SUPREME COURT DENIED APPLICATION FOR LEAVE TO APPEAL.

A. The Principles of *Chappel v. Montgomery County Fire Protection District No. 1*, 131 F.3d 56 (CA 6, 1997) Warrant a Remand to the Lower Court for Trial on Plaintiff's 42 U.S.C. §1983 Claim, Because the Lower Court Erroneously Found that Appellant's Free Speech Rights Were A Matter of Private Concern Rather than Public Concern.

The core value of the Free Speech clause of the First Amendment is in the public interest of having free and unhindered speech on matters of public importance. It is particularly important that public employees be able to speak out freely on questions of public concern, without fear of retaliation, according to the teachings of the Supreme Court in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 571-72 (1968). In *Chappel v. Montgomery County Fire Protection District No. 1*, 131 F.3d 56 (CA 6, 1997) the 6th Circuit addressed this issue holding that subjective motivations are not dispositive of the issue of whether speech addresses a matter of purely personal concern.

After remand, the Court of Appeals reconsidered this matter and issued its unpublished opinion. The Court of

Appeals acknowledges the holding in *Chappel v. Montgomery County Fire Protection District No. 1*, and notes that the decision was decided approximately four months after their original decision. Still, the court fails to analyze this case in a manner demanded by Chappel. The Court of Appeals states:

> "After a careful review of Plaintiff's allegations in the present case, and being mindful that it is the message, rather than the motive, that is of utmost importance, *Chappel, supra*, we conclude that the speech at issue is not a matter of public concern."

The Court of Appeals attempts to treat Appellant's speech as a "mere extension" of the dispute concerning the coaching position. In doing this, the court fails to consider the deposition testimony, exhibits, and other documents submitted to the court in a light most favorable to the nonmoving party. Consequently, the court has fallen short of its mission on the remand by relying entirely on the unsupported claim that Appellant's motive relates back to the coaching position. This is factually incorrect. It is, of course, the "spin" put on the facts by the Appellees School Board and Union, but it is simply spin. In order to conclude that Appellant's criticism is nothing more than an extension of a dispute, the court is compelled to make judgments concerning motives and to make judgments about the speech, which, while consistent with the arguments made by the Appellees, are not supported by the record.

As is true in many of these cases involving free speech, the issue touches on both personal and public matters. Appellant contends that the lower court and the

Court of Appeals erroneously found that Mr. Sullivan's free speech right related solely to matters of private concern. Mr. Sullivan argues that his criticism regarding the illegal contract, the payment of Union dues, and the school district's alleged "modified agency shop" issues were also matters of public concern. These issues not only affected Mr. Sullivan, they affected his fellow colleagues, the students he taught, and the community at large. Mr. Sullivan spoke out on these issues in public and encouraged his fellow citizens to voice their opinions as well. For Mr. Sullivan's protected speech, he suffered retaliation by the School Board, the Superintendent, and the very agency that was supposed to protect his rights – the River Valley Education Association.

The Temple memo, read in a public meeting in front of the press, with no opportunity to respond, after the hearing where his side would have been heard had just been cancelled, deprived him of a liberty interest triggering due process rights. He was, thereby, entitled to a name-clearing hearing under *Arrington v. County of Dallas*, 970 F.2d 1441 (5th Cir. 1992) and *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). "An essential principle of due process is that a deprivation of life, *liberty*, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). A public employee must receive either "oral or written notice of the charges against him, *an explanation of the employer's evidence, and an opportunity to present his side of the story.*" *Id.* at 546. (Emphasis added.) Not only was Mr. Sullivan

denied a name-clearing hearing, the reading of the charges accusing him of unethical conduct was done in such a way so as to be calculated to prevent any response at all.

It is for the court to determine as a matter of law whether Plaintiff-Appellant statements amounted to issues of public concern rendering it protected First Amendment speech. *Connick v. Myers*, 461 U.S. 138 (1983). Moreover, the threshold question of when the activity is protected has been whether the speech relates to "any matter of political, social or other concern to the community." *Id.* at 146 Furthermore, in affording protection to such speech, this Court reasoned that such "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* at 145 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Mr. Sullivan was bringing to the attention of teachers and the public the school board's acquiescence to the illegal agreement between the superintendent and the union president, which voided the teachers' contract.

The due process right to a hearing provides vital protection against arbitrary government action. Fundamental fairness requirements which go hand in hand with rights of due process join in the protection against arbitrary actions taken by governmental bodies such as the school board in this action. To allow less than a fair hearing with an impartial tribunal, proper evidence and evaluation of only that evidence validly presented, undermines the directives of constitutional due process. The actions of the Defendants-Appellees in this matter not only undermined Mr. Sullivan's due process rights, but in fact stripped away the protection provided by due

process guarantees through their conduct. The clear abuse of proper procedure in spreading fabrications before the public and Plaintiff's peers without opportunity to respond fully demonstrates the deliberate and calculated conduct of the Defendants-Appellees.

If Mr. Sullivan was not disrupting school or affecting the effective functioning of the school district, then no basis remains for the school's attempts to quell Mr. Sullivan's first amendment rights. *Connick*, 461 U.S. at 147.

In addressing these cases, courts proceed from the proposition that the First Amendment is implicated whenever a government employee is disciplined for his speech. *Waters v. Chaffin*, 684 F.2d 833, 837 (11th Cir. 1982). In a case where an employee was demoted and transferred, *McGill v. Bd. of Education*, 602 F.2d 774, 780 (7th Cir. 1979) the court determined the adverse employee actions are just as likely to chill constitutionally protected speech. Accordingly, First Amendment principles are the same whether the retaliation takes the form of alternate employment conditions or outright termination or attempts at termination. *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir. 1987).

Mr. Sullivan, as a public employee in a state school district with 16 years experience in the River Valley School District, has a property interest in his teaching profession, which property right has been damaged as a result of the wrongful conduct of Defendants-Appellees. Mr. Sullivan has, since November of 1990, attempted to exercise his free speech rights with reference to members of the school board and their operation of the school board. He has also attempted to exercise his free speech

rights concerning the activities of the Union and its leaders. Mr. Sullivan has made statements in writing and verbally in public, which have been critical of both school board and its individual members as well as the Union and its leadership. He has addressed these concerns in the process available to him. Mr. Sullivan has, over this period of time, attempted to exercise his free speech and due process rights under both the federal and state constitutions and to appeal to the public to become involved in the school district. For his actions, Mr. Sullivan's property interest in his profession has been damaged by Defendants-Appellees' wrongful actions and has, every year, been made to endure discharge proceedings instituted by the School Board and Union. Not only were discharge proceedings instituted, but the school posted his job, and the board refused to allow Mr. Sullivan the public hearing he requested.

Whether an employee's specific activity is protected, "meaning that the public employer is required to tolerate it", is determined on a case by case basis. *Dicks v. City of Flint*, 684 F. Supp. 934, 937 (E.D. Mich. 1988). This Court has adopted a balancing test to determine whether the First Amendment rights have been violated:

> "The interests of the employee in making the statement must be balanced against the interest of the state as an employer in promoting the efficiency of the public service it performs through its employees."

Pickering v. Bd. of Education, 391 U.S. 563 (1968). Under *Pickering* and its progeny, "the state interest element of the test focuses on the effective functioning of the employee enterprise." *Id.* The Court, in essence, held that

a public employee enjoys the same right as other citizens to comment on matters of public concern and as such, the employee's speech should be afforded First Amendment protection. *Id. at 391.* Moreover, under a recent case entitled *Waters v. Churchill,* 114 S.Ct. 1878 (1994), the Supreme Court expanded the rights of public employees faced with discipline or discharge from employment for engaging in constitutionally protected speech. The majority opinion held that a public employer has a duty to conduct a reasonable investigation into the nature of an employee's speech and the circumstances surrounding the utterance of this speech before taking disciplinary action against the employee. In essence, the majority concluded that an employee has a right to procedural due process – likened to an employee's Fourteenth Amendment due process rights in cases where they have a property interest in employment – before being terminated for engaging in speech. *Id.* at 114; *S-1 v. The State Board of Education,* 63 U.S.L.W. 3109 (August 1, 1994), *cert. denied,* 63 U.S.L.W. 3263 (October 3, 1994). Defendants-Appellees never conducted any formal investigation into Mr. Sullivan's allegations against the School Board and the Union. In *Chappel,* the court made it clear that the analysis must not be based solely on the motivations involved in the speech. Mr. Sullivan ended his Union membership in 1990, after he discovered what he considered to be unethical and illegal practices.

In retaliation for Mr. Sullivan's public criticism, the Union, together with the School Board, conspired to terminate Mr. Sullivan in violation of 42 U.S.C. § 1983. As a part of this effort, both the Union and members of the School Board made false statements, which portrayed Mr.

Sullivan in a demeaning manner and caused harm to his reputation. Ms. Temple's June 22, 1992 memo, understood in context, is clear evidence that it relates to public issues. The Union specifically adopted the statements set forth in the document.

Important for the Court to recognize here is the manner in which these events were occurring. Mr. Sullivan had raised suspicions and concerns about the Union's conduct to the extent that he asked the MEA to investigate their actions. After he raised these concerns about the Union, both worked together to eliminate this alleged "troublemaker" who would not simply sit back and let the union run without question. This is the type of behavior for which FORBES criticized the National Education Association. This nationally influential magazine described the NEA as nothing more than a "National Extortion Association" whose insatiable drive for power and perquisites has led it to act in a ruthless and unethical manner. Its president, in 1993, Keith Geiger, appeared at a rally in Kalkaska, Michigan to show his support of the school shutting down after voters had repeatedly rejected tax hikes. Mr. Geiger's implicit message to the voters was clear: "Never mind the nonsense about teaching as a public trust; pay up or we'll shut you down!" Brimelow and Spencer, *Suffer the Little Children: How the National Education Association Corrupts Our Public Schools,* FORBES, June 7, 1993. This teachers' union, it claims, is not for the benefit of teachers, but as a platform to promote its partisan politics; to dividing its "power between quickly rotating elected teachers and school employees, such as the presidents, and permanent professional staff, such as executive directors, who tend to control the local

level"; and by lining its pockets with "unified dues." *Id.* Sullivan was not speaking out for his benefit alone. All public schools in the River Valley School District, as well as the citizens to whom he appealed, were affected.

The lower court and the Court of Appeals found that Mr. Sullivan's speech involved matters solely of private concern, but both failed to consider the political, social or other concerns to the community at large. If there is one "hot" political issue in Michigan (perhaps the country), it is Education. How teachers are treated under "agency shop" and the use of this provision to force the termination of dissenting teachers has been publicly debated and widely criticized. These were not "purely private" matters. See *Kincade v. City of Blue Springs,* 64 F.3d 389 (8th Cir. 1995); *Brown v. Disciplinary Committee of Edgerton Volunteer Fire Department,* 97 F.3d 969 (1996). Moreover, when the Supreme Court in its cases establishing and bounding the rights of public employees to exercise free speech limited those rights to speech on public matters; they meant matters in which the public might be interested, as distinct from wholly personal grievances. *Connick v. Myers,* 461 U.S. 138 (1983).

Mr. Sullivan was not only protecting his property rights to continue teaching without the threat of Union and Board retaliation, he was also speaking out for other teachers facing the same decision to join or not join the Union. According to the Master Agreement, not all teachers were part of the agency shop. Two teachers in particular, Georgia Songer and Betsy Sexton, were not members of the Union, nor were they part of the agency shop clause; however, both of them were sent packets telling them they were required to pay a fee or join the

Union. They both felt that this was a form of harassment and trickery by the Union in an attempt to trick or deceive them into thinking they were financially obligated.

Mr. Sullivan addressed his complaints in the public forum, through newspapers and public board meetings. For example, the South County Gazette described Mr. Sullivan's criticisms against the Union and the Board in the following manner,

> "Sullivan has been publicly accusing the school board of conspiring to fire him and altering a teacher's contract without their approval . . . Sullivan alleged that the teachers' original contract said that all teachers were obligated to join the union (or pay a representation fee) within 60 days after the contract was ratified. According to Sullivan, the contract that was eventually put into place stated that all new teachers employed after June 30, 1977 must become union members or pay their representation fees. This discrepancy affected several teachers who were then obligated to join the union or pay the fees. Sullivan accused the board and the union of changing the contract after it was ratified by the teachers."

Mr. Sullivan's remarks against the Union and the School Board were done so as to encourage the public to become involved in the school district. The editorials in the various local newspapers support this claim. The fact that Mr. Sullivan was affected by these issues does not make them matters of purely private concern.

Appellant contends that if the School Board and the Union did not view his criticism as matters of public

concern, they would not have bothered to respond to his criticisms through the media. However, they did. The Board and the Union issued a memorandum rebutting Mr. Sullivan's allegations at a public hearing where the media was invited. At this board meeting, Jane Temple not only read her June 22 memo lambasting Mr. Sullivan in front of the media, but also handed a copy of said memo to reporters.

Mr. Sullivan was bringing to the attention of teachers and the public at large the School Board's acquiescence to the illegal agreement between the superintendent and the union president which voided the teachers' contract. Clearly, issues of School Board and Union misconduct and collusion are issues of community concern. One must be reminded that since the signing of the first collective-bargaining contract in New York City some 35 years ago, teacher unions have become the single most influential force in public education. However, as the U.S. NEWS AND WORLD REPORT noted, union policies have worked against quality teaching and have driven many top teachers out of public schools. Toch, *Why Teachers Don't Teach: How Teacher Unions Are Wrecking Our Schools*, U.S. NEWS & WORLD REPORT, February 26, 1996. One such teacher, who was eventually forced out of teaching, is Jaime Escalante, the Los Angeles math teacher, who became a national hero for his work with barrio kids at Garfield High School and who was portrayed in the 1988 film, *Stand and Deliver.* Mr. Escalante states, "I thought the union was going to focus on how to improve our skills. But they're more interested in politics than kids." *Id* at 64.

"The intransigence of the union has slowed the pace of school reform and has undermined public confidence

in public schools." Instead of being part of the solution of what ails society today, "teacher unions have used their resources to fight reform." *Id.* at 63 and 70. Mr. Sullivan's outspoken reproof of illegal Union activities was done in order to notify the public of the collusion that was going on between the Union and the School Board. Mr. Sullivan felt that the public had a right to know that its public education was being compromised by the politicking that was going on behind the scenes. Instead of the Union assisting Mr. Sullivan in reforming the School Board's wrongful practices and policies, the Union was condoning the School Board's illegal actions. While Mr. Sullivan became the target of both the Union and the Board after his outspokenness, and had to defend himself, his efforts to do so should not be used to mischaracterize the broader issue as purely private.

CONCLUSION

Mr. Sullivan's activities in speaking out against the illegal activities of the Union and Board were hampered by the Appellees' retaliatory actions against him. The issues he was publicly extolling were of broad social and political concern. On remand from this court, the Court of Appeals has missed the mark. It has taken those public concern issues such as "agency shop" and "illegal contracting" and through its reasoning attempted to label their content, form, and context as private. In most instances where individuals begin to speak out about matters that are of public concern, it begins as an issue that perhaps affects an individual directly. The content, form, and context in the record as a whole is an important

teaching in the Supreme Court in *Connick v. Myers*. There will be a great chilling effect on the willingness for public employees to speak out on issues when personal interest may have been a motivating force in getting someone energized to evaluate how the system works and to figure out what needs to be said and done to fix it. The Union and the School Board at each stage where they have attempted to deny Mr. Sullivan a hearing, have constantly sung the refrain that you are only doing this because you are upset over the coaching position. So far, that red herring has been a successful diversion in this case to deny Mr. Sullivan his day in court. The Court of Appeals once again, in its evaluation on remand, failed to evaluate the content, form, and context of these issues in light of their political, social, and other concerns to the community and the Michigan Supreme Court has denied application for leave to appeal.

RELIEF REQUESTED

Petitioner respectfully requests this petition be granted and a writ of certiorari issue to review this case and remand to the lower court for trial on the merits.

Respectfully submitted,

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STATE OF MICHIGAN
COURT OF APPEALS

RICHARD SULLIVAN, Plaintiff-Appellant, v RIVER VALLEY SCHOOL BOARD, RIVER VALLEY EDUCATION ASSOCIATION, CHARLES O. WILLIAMS, Superintendent of River Valley Schools, PHIL BENDER, President of River Valley Education Association, JANE TEMPLE, GARY B. SOMMERS, PAMELA BEHNKE, DENNIS ZEIGER, RICHARD RIETH, VICKIE PAILING, LYNDA VACKAR and WESLEY LIND, jointly and severally in their individual and official capacities, Defendants-Appellees.	UNPUBLISHED November 6, 1998 No. 181913 Berrien Circuit Court LC No. 93-002066-NZ ON REMAND

Before: Hood, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

This case is before us for the second time.[1] In the original opinion, the panel affirmed the trial court's

[1] Pursuant to our Court policy, Judge Doctoroff has been substituted for visiting Circuit Judge M.A. Chrzanowski, who sat as a member of the original panel in this matter by assignment.

dismissal of plaintiff Richard Sullivan's action against defendants River Valley Education Association and its president Phil Bender (RVEA), and River Valley School Board, along with its superintendent, Charles O. Williams, and board members Jane Temple, Gary Sommers, Pamela Behnke, Dennis Zeiger, Richard Rieth, Vicki Pailing, Lynda Vackar and Wesley Lind (RVSB). *Sullivan v River Valley School Bd*, unpublished opinion per curiam of the Court of Appeals, issued July 11, 1997 (Docket No. 181913). Plaintiff applied for leave to appeal and our Supreme Court, in lieu of granting leave, remanded to this Court "for reconsideration of the plaintiff's claim under 42 USC 1983, in light of the reasoning in *Chappel v Montgomery County Fire Protection Dist #1*, 131 F3d 564 (CA 6, 1997)."[2] *Sullivan v River Valley School Bd*, 569 Mich 862-863; ___ NW2d ___ (1998). On remand, we affirm the dismissal of plaintiff's allegations pursuant to §1983.

I

Plaintiff's complaint alleged that defendants punished and retaliated against plaintiff for the exercise of his First Amendment right to free speech. At the outset, we must determine whether the alleged speech at issue may be "fairly characterized as constituting speech on a matter of public concern." *Connick v Myers*, 461 US 138, 146; 103 S Ct 1684 75 L Ed 2d 708 (1983). Matters of public concern are those that may be "fairly characterize[d] . . . as relating to any matter of political, social, or

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[2] We note that *Chappel* was decided approximately four months after our original decision in this case.

other concern to the community." *Rahn v Drake Center, Inc*, 31 F3d 407, 412 (CA 6, 1994). Whether speech addresses a matter of public concern is a question of law "determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 US at 147-148; 103 S Ct at 1690.

In *Chappel, supra*, the Sixth Circuit held that an individual's personal motives for speaking is not dispositive. Indeed, the distinction at issue is "between matters of public concern and matters of personal interest, not civic-minded motives and self-serving motives." *Id.* at 575. Indeed, " '[t]he motive which underlies an employee's statements is a relevant, but not necessarily dispositive factor' when considering whether an employee's statements may be fairly characterized as relating to any matter of political, social, or other concern to the community." *Id.* at 576, quoting *Cliff v Bd of Sch Comm'rs of Indianapolis*, 42 F3d 403, 409 (7 CA, 1994).

After a careful review of plaintiff's allegations in the present case, and being mindful that it is the message, rather than the motive, that is of utmost importance, *Chappel, supra*, we conclude that the speech at issue was not on a matter of public concern. Though critical of RVEA and RVSB, plaintiff's speech was a "mere extension" of plaintiff's dispute over his unsuccessful bid for a coaching position, his subsequent withdrawal from the union, and his dispute regarding payment of representation fees. *Connick, supra* at 148. The speech at issue reflected nothing more than complaints regarding an essentially private employment dispute, and "an attempt to turn [plaintiff's] displeasure into a cause celébre." Such speech is not subject to protection by the First

Amendment. Consequently, plaintiff's §1983 action alleging a denial of his freedom of speech was properly dismissed.[3]

II

The Supreme Court's order on remand does not affect our earlier decision affirming the dismissal of the remaining counts in plaintiff's complaint. Accordingly, that holding stands as the law of the case.

Affirmed.

/s/ Harold Hood
/s/ Martin M. Doctoroff
/s/ Janet T. Neff

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[3] We note that RVSB argues that plaintiff's §1983 action was properly dismissed because plaintiff suffered no adverse employment action as a result of his speech, and that RVEA argues that, as a private, unincorporated association, it is not subject to this cause of action at all. In light of our determination that the alleged speech at issue was not of public concern, and thus not protected by the First Amendment, we need not reach these additional grounds for dismissal.

Court of Appeals, State of Michigan

ORDER

Richard Sullivan v River Valley School Board

Docket No. 181913

LC No.93002066 NZ

Harold Hood
Presiding Judge

Martin M. Doctoroff

Janet T. Neff
Judges

The Court orders that the motion for leave to file supplemental brief is DENIED.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

(SEAL)

October 28, 1998
Date

/s/ Carl L. Gromek
Chief Clerk

Order

Entered: September 15, 1998

110733

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

RICHARD SULLIVAN,

Plaintiff-Appellant,

v

RIVER VALLEY SCHOOL BOARD, RIVER VALLEY EDUCATION ASSOCIATION, CHARLES O. WILLIAMS, Superintendent of River Valley Schools, PHIL BENDER, President of River Valley Education Association, JANE TEMPLE, GARY B. SOMMERS, PAMELA BEHNKE, DENNIS ZEIGER, RICHARD RIETH, VICKIE PAILING, LYNDA VACKAR and WESLEY LIND, jointly and severally in their individual and official capacities,

Defendants-Appellees.

SC: 110733
COA: 181913
LC: 93-002966-NZ

On order of the Court, the application for leave to appeal is considered, and, pursuant to MCR 7.302(F)(1),

in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration of the plaintiff's claim under 42 USC 1983, in light of the reasoning in *Chappel* v *Montgomery County Fire Protection Dist #1*, 131 F3d 564 (CA 6, 1997).

We do not retain jurisdiction.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

(SEAL)

September 15, 1998 /s/ Corbin R. Davis

Clerk

Court of Appeals, State of Michigan

ORDER

Richard Sullivan v River Valley School Board

Docket No. 181913

LC No. 93-002966 NZ

Harold Hood
Presiding Judge

Janet T. Neff

Mary A. Chrzanowski
Judges

The Court orders that the motion for rehearing is hereby DENIED.

A true copy entered and certified by Ella Williams, Chief Clerk, on

(SEAL)

SEP 25 1997
Date

/s/ Ella Williams
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD SULLIVAN,

Plaintiff-Appellant,

v

RIVER VALLEY SCHOOL BOARD, RIVER VALLEY EDUCATION ASSOCIATION, CHARLES O. WILLIAMS, Superintendent of River Valley Schools, PHIL BENDER, President of River Valley Education Association, JANE TEMPLE, GARY B. SOMMERS, PAMELA BEHNKE, DENNIS ZEIGER, RICHARD RIETH, VICKIE PAILING, LYNDA VACKAR and WESLEY LIND, jointly and severally in their individual and official capacities,

Defendants-Appellees.

UNPUBLISHED
July 11, 1997

No. 181913
Berrien Circuit Court
LC No. 93-002066-NZ

Before: Hood, P.J., and Neff and M. A. Chrzanowski*, JJ.

PER CURIAM.

Plaintiff, Richard Sullivan, a tenured teacher with the River Valley School District, appeals as of right three

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* Circuit judge, sitting on the Court of Appeals by assignment.

orders of the circuit court which, taken together, dismissed plaintiff's action against defendants, River Valley Education Association and its president Phil Bender (RVEA), and River Valley School Board, along with its superintendent, Charles O. Williams, and board members Jane Temple, Gary Sommers, Pamela Behnke, Dennis Zeiger, Richard Rieth, Vickie Pailing, Lynda Vackar and Wesley Lind (RVSB). We affirm.

I

Plaintiff's dispute began in 1990, when he filed a grievance after an unsuccessful bid for a coaching position. Plaintiff's grievance was denied, and plaintiff withdrew his membership in RVEA. As a nonmember, plaintiff was required to pay a yearly representation fee or face termination for failure to do so. In both the 1991-1992 and 1992-1993 school years, the parties became embroiled in issues regarding plaintiff's method of paying his representation fee, particularly with regard to whether the fee should have been submitted to the Michigan Education Association or to RVEA, and whether plaintiff was permitted to withhold payment of the balance of the fee until the exact amount was set by arbitration. As noted by the circuit court, throughout their dispute, "[t]he parties traded accusations and counter-accusations, many of which were aired in local newspapers."

In the Spring of 1992 and 1993, because plaintiff failed to pay the representation fee according to established procedures, RVEA requested that RVSB schedule termination proceedings. Each time, however, plaintiff

paid the balance of the fee prior to the scheduled hearing, albeit "under protest". Upon learning that plaintiff had paid the required fee, RVEA withdrew its complaints and the scheduled pretermination hearings were canceled.

At a RVSB meeting on June 22, 1992, board president Jane Temple read a memo addressing plaintiff's situation. The memo contained the following assertions: (1) plaintiff received due process regarding the coaching grievance; (2) the agency fee dispute was between the RVEA and plaintiff, not the board, and plaintiff attempted to blame both the RVEA and the RVSB for his nonpayment, although he was aware of the language of the master agreement, in an attempt "to confuse the issue to make him appear as the grieved party"; (4) whether plaintiff paid at the state or local level was immaterial, because he paid his fees on May 13, 1992, five days before the arbitration hearing, and the charges were dropped after RVEA notified RVSB that plaintiff had paid and notice was mailed to plaintiff; (5) plaintiff had previously stated to the press that he had paid his fees in full, which the board took as agreement on his part that the fees had in fact been paid, and plaintiff made no attempt to notify or verify the evidence directly to the Board; (6) plaintiff's delayed payment and threats of legal action delayed settlement of the issue and cost the taxpayers more in legal consultations. The memo concluded:

> Both issues [coaching and agency fee] were manipulated by [plaintiff] to meet his own personal objectives. We find this to be less than professional and ethical. His attempt to gather support from his students in the classroom over

> a Union issue indicates serious consideration of his teaching ethics.
>
> [Plaintiff] has harassed, both in person and by written word, his fellow teachers, the teachers' union officers, administrators, and the Board of Education over a period of more than one and a half years. He has misquoted and misrepresented statements made by them to the media and in sarcastic, hurtful, insinuating letters. We expect this unprofessional and unethical behavior to cease as of this date.

On June 21, 1993, plaintiff filed his complaint, alleging that defendants defamed him; that defendants intentionally inflicted mental anguish and interfered with his contractual and business relationship; and that defendants placed plaintiff in a false light. Plaintiff's amended complaint added counts alleging that defendants denied and conspired to deny plaintiff his constitutional rights to free speech, due process, and equal protection.

Subsequently, RVEA and RVSB each filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). The court, in three separate orders, ultimately granted the defendants' motions and dismissed plaintiff's action in its entirety.

II

Plaintiff challenges the circuit court's dismissal of plaintiff's claims against RVSB of defamation, false light, interference with contract, and intentional infliction of emotional distress based on governmental immunity. Although we find that executive immunity, rather than governmental immunity, applies to bar plaintiff's tort

claims,[1] we nonetheless affirm the circuit court's order of dismissal. See *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 565 (1997) (Court of appeals will affirm a circuit court's ruling that reached the right result, even if for the wrong reason).

Governmental immunity bars tort claims against "judges, legislators, and the elective or highest appointed executive officials of all levels of government . . . whenever they are acting within the scope of their judicial, legislative, or executive authority." MCL 691.1407(5); MSA 3.996(107)(5). A school district is a "level of government" described by the statute. *Napela v Plymouth-Canton Community Schools*, 207 Mich App 580, 587; 525 NW2d 897 (1994), aff'd in result, 450 Mich 934 (1994). Moreover, school board members are "elective officials" of a level of government and the superintendent is the "highest appointed executive" of the school district. *Id.* at 587-590. Thus, both school board members and superintendents fall under the purview of the statute and are entitled to absolute immunity when acting within the scope of their authority. MCL 691.1407(5); MSA 3.996(107)(5).

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[1] It is without question that counts I-III of plaintiff's complaint all sound in tort. *Doe v Mills*, 212 Mich App 73, 79-80; 536 NW2d 824 (1995) (false light invasion of privacy); *Adams v NBD*, 444 Mich 329, 336; 508 NW2d 464 (1993) (defamation); *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 80; 480 NW2d 297 (1991) (intentional infliction of emotional distress); *Feaheny v Caldwell*, 175 Mich App 291, 301; 437 NW2d 358 (1989) (interference with contract and business relationship).

Pursuant to the master agreement, RVEA requested that RVSB terminate plaintiff for nonpayment of a representation fee. As superintendent, Williams was responsible for supervising plaintiff MCL 380.132(4); MSA 15.4132.[2] Accordingly, RVSB had authority both to handle matters regarding plaintiff's nonpayment of the representation fee and to respond to plaintiff's criticism of RVSB's actions in this regard. *American Transmissions Inc v Attorney General*, 454 Mich 135, 144; 560 NW2d 50 (1997). RVSB is immune from tort liability because it was acting "within the scope of [its] executive authority." *Id.*; MCL 691.1407(5); MSA 3.996(107)(5).

III

We now turn to plaintiff's tort claims against RVEA and Bender. Plaintiff first argues that the circuit court erred in granting defendant's motion for summary disposition on plaintiff's defamation claim. We disagree.

A.

A communication is defamatory if it tends to lower a party's reputation in the community or to deter third persons from associating or dealing with him. *Rouch v Inquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992). Plaintiff must plead and prove: (1) a false and defamatory statement concerning plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence on the

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[2] Repealed by 1995 PA 189 §§ 2 and 3 (1995).

part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. *Id.*

Pleading defamation requires specificity, and the degree of specificity required depends on whether the action is based in libel or slander. *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc,* 197 Mich App 48, 53-55; 495 NW2d 392 (1992). Because libel is written, it must be pleaded verbatim; however, a more generous rule applies to slander because it cannot be retained verbatim. *Id.* In the present case, plaintiff alleges libel as to the Temple memo; plaintiff's remaining allegations (regarding statements that plaintiff had been reprimanded and had been terminated) are of slander.

B

Plaintiff attributed the oral statements to "all of the Defendants." However, plaintiff failed to plead or submit evidence to show that RVEA or Bender either made or adopted these statements. To the contrary, plaintiff submitted evidence that school board member Pamela Behnke made the statement regarding the reprimand, and that Temple made the statement that implied plaintiff would be terminated. In the absence of any evidence linking the statements to RVEA or Bender, plaintiff's claim against RVEA and Bender was properly dismissed by the circuit court.

C

We further find that plaintiff's libel claim, based on the Temple memo, was properly dismissed. Regarding RVEA, plaintiff did not plead with sufficient specificity that RVEA participated in the Temple memo. Moreover, although plaintiff specifically alleged that Bender "adopted" the Temple memo, Bender's actions fall within the scope of a qualified privilege.

The determination of whether a qualified privilege exists is one of law for the court. *Swenson-Davis v Martel*, 135 Mich App 632, 636; 354 NW2d 288 (1984). A qualified privilege extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty. *Id.* Here, the Temple memo clearly falls within the scope of a qualified privilege. Teachers' payment of representation fees is a matter in which Bender (as president of RVEA) and RVSB had an interest and a duty. Bender was thus qualifiedly privileged to comment on the controversy surrounding plaintiff's payment of the fee.

Having determined that a qualified privilege protected Bender's adoption of the Temple memo, we must next decide whether a material issue of fact existed as to whether Bender acted with actual malice, which would remove it from the privilege. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 79; 480 NW2d 297 (1991). In doing so, we note that where a qualified privilege exists there is a presumption of good faith. *Nuyen v Slater*, 372 Mich 654, 660; 127 NW2d 369 (1964). In his complaint, plaintiff alleges that Bender "acted maliciously and with

knowledge of the Temple memo's falsity." Such general allegations are insufficient to establish a genuine issue of fact regarding the issue of actual malice. *Gonyea, supra* at 79-80.

Because Bender was entitled to a qualified privilege regarding the Temple memo, and because plaintiff has not alleged specific facts that would remove the statements from this privilege, the circuit court's grant of summary disposition was proper.

IV

Plaintiff next argues that the circuit court erred in granting summary disposition for RVEA and Bender on plaintiff's claim of false light invasion of privacy. We disagree.

The tort of false light invasion of privacy is based on publicity that places plaintiff in a false light in the public eye. *Ledl v Quick Pik Stores*, 133 Mich App 583, 591-592; 349 NW2d 529 (1984).

> In order to maintain an action for false light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position. [*Porter v City of Royal Oak*, 214 Mich App 478, 486; 542 NW2d 905 (1995).]

In addition, the defendant must have known of or acted in reckless disregard as to the falsity of the publicized

matter and the false light in which the plaintiff would be placed. *Detroit Free Press v Oakland County Sheriff*, 164 Mich App 656, 666; 418 NW2d 124 (1987).

Plaintiff's false light claim is based on two groups of statements. The first is the Temple memo, which plaintiff alleged was adopted by Bender. As discussed above, Bender enjoys a qualified privilege regarding the memo. Moreover, the statements in the Temple memo were not "unreasoanble or highly objectionable" considering the course of conduct between the parties. We agree with the circuit court that "after plaintiff has chosen to take off his gloves and engage in a street brawl, this Court will not sustain his cries of 'foul' when his own nose gets bloodied."

The second group of statements alleged by plaintiff to give rise to his false light claim includes those that plaintiff had been reprimanded and that falsely implied that plaintiff would be terminated. As noted above, plaintiff failed to submit evidence attributing these statements to RVEA or Bender. Therefore, plaintiff's false light invasion of privacy claim was properly dismissed by the circuit court.

V

Plaintiff also challenges the circuit court's dismissal of Count II, which alleged both interference with a contract and intentional infliction of emotional distress. We find no error in the circuit court's ruling.

A

Plaintiff's interference claim alleges two different torts, both recognized in Michigan: (1) the instigation of a breach of contract, and (2) the interference with an advantageous relationship *Feaheny v Caldwell*, 175 Mich App 291, 301; 437 NW2d 358 (1989). For interference with a contract, a plaintiff must demonstrate a breach of contract caused by the defendant. *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 287; 393 NW2d 610 (1986). For interference with a business relationship, a plaintiff must show an intentional interference inducing or causing a breach or termination of a relationship or expectancy. *Pryor v Sloan Valve Co*, 194 Mich App 556, 560; 487 NW2d 846 (1992).

As noted by the circuit court, plaintiff's employment relationship with the River Valley School District was never terminated. Consequently, summary disposition of this claim was appropriate. MCR 2.116(C)(8).

B

Defendant also alleged that RVEA committed intentional infliction of emotional distress. Our Supreme Court has adopted the following definition of this tort:

> One who by extreme outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. [*Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985) (quoting Restatement Torts, 2d, § 46, p71).]

The defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Linebaugh v Sheraton Michigan Co,* 198 Mich App 335, 342; 497 NW2d 585 (1993).

The circuit court correctly determined that defendants' conduct was "not remotely close" to the extreme and outrageous conduct required to establish a claim of intentional infliction of emotional distress. At most, the conduct was more akin to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," for which there is no liability. *Id.* Accordingly, we find the circuit court properly dismissed this claim.

VI

Plaintiff's final argument challenge the circuit court's dismissal of his constitutional claims against RVSB and RVEA. Because plaintiff was not deprived of his constitutional rights, we find no error in the circuit court's ruling.

A

Plaintiff first alleges that he was deprived of his rights to free speech and due process in violation of 42 USC 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State of Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress . . . [42 USC 1983.]

Section 1983 is not itself the source of substantive rights, but merely provides a remedy for the violation of rights guaranteed by the federal Constitution or federal statutes. *Carlton v Dep't of Corrections*, 215 Mich App 490, 502; 546 NW2d 671 (1996). Plaintiff must plead and prove that (1) he was deprived of a right secured by the Constitution and laws of the United States; and (2) that the defendants deprived him of this right while acting under color of law. *Montgomery v Detroit*, 181 Mich App 298, 308; 448 NW2d 822 (1989).

1

Plaintiff's complaint alleged that he was deprived of his right to free speech. Plaintiff must show that his speech involved a matter of public concern, as determined by the content, form, and context of a given statement as revealed by the whole record. *Connick v Meyers*, 461 US 138, 148 n7; 103 S Ct 1684; 75 L Ed 2d 708 (1983); *Michigan State AFL-CIO v Michigan Employment Relations Comm*, 212 Mich App 472, 495; 538 NW2d 433 (1995), aff'd 453 Mich 362 (1996).

Plaintiff's statements regarding RVEA and RVSB were solely of private concern, namely, plaintiff's application for a coaching position, his subsequent withdrawal from the union, and his payment of representation fees. As noted by the circuit court, "[p]laintiff cannot make it

otherwise by accusation of misconduct, illegal deals, or 'fingers in the cookie jar.' " Plaintiff's § 1983 action alleging a denial of his freedom of speech was properly dismissed.

2

Plaintiff also contends that he was deprived of his right to due process because he was denied a "name-clearing hearing." We disagree. The federal and state Constitutions guarantee that a person will not be deprived of life, liberty, or property without due process of law. US Const, Am V; Const 1963, art I, § 17. "Invocation of the right to due process necessarily requires involvement of a life, liberty, or property interest." *City of St. Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd*, 215 Mich App 69, 74; 544 NW2d 705 (1996).

It is undisputed that plaintiff did not lose his job or any benefits thereof. Any damage to his reputation, standing alone, would be insufficient "to invoke the guarantees of procedural due process absent an accompanying loss of government employment". *Paul v Davis*, 424 US 693, 706; 96 S Ct 1155; 47 L Ed 2d 405 (1976); *see Manning v Hazel Park*, 202 Mich App 685, 694; 509 NW2d 874 (1993). Plaintiff has failed to demonstrate that due process required that he be afforded a "name clearing" hearing, and the circuit court properly dismissed this count.

B

Plaintiff alleges that defendants conspired to deprive him of his rights in violation of 42 USC 1986, which states:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed shall be liable to the party injured . . .

Insofar as plaintiff failed to show a deprivation of constitutional rights, he has failed to state a claim under § 1986. This count was properly dismissed by the circuit court.

VII

The circuit properly granted summary disposition as to each of plaintiff's claims against RVEA and RVSB. We therefore affirm the orders of the circuit court dismissing plaintiff's action in its entirety.

Affirmed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Mary A. Chrzanowski

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF BERRIEN

RICHARD SULLIVAN,

Plaintiff,

v

RIVER VALLEY SCHOOL BOARD, et al.,

Defendants.

File No. 93-2066-NZ-T

HON. RONALD J. TAYLOR

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ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the Circuit Courtrooms, City of St. Joseph, Berrien County, Michigan, on this 13 day of December, 1994.

PRESENT: HONORABLE RONALD J. TAYLOR, Circuit Judge

The Court has considered Defendants' Amended Renewed Motion for Summary Disposition, Plaintiff's Response in Opposition thereto, has reviewed the entire file in this matter, and is otherwise fully advised in the premises. For the reasons stated by the Court from the bench at the hearing held on this Motion on November 7, 1994,

IT IS ORDERED:

1. Defendants' Motion as to Count II (intentional infliction) of Plaintiff's Second Amended Complaint is granted pursuant to MCR 2.116(C)(8) and (10).

2. Defendants' Motion as to the free speech component of Count IV of Plaintiff's Second Amended Complaint is hereby granted pursuant to MCR 2.116(C)(8) and (10).

3. Defendants' Motion as to the due process component of Count IV of Plaintiff's Second Amended Complaint is hereby granted pursuant to MCR 2.116(C)(8) and (10).

4. Defendants' Motion as to the equal protection component of Count IV of Plaintiff's Second Amended Complaint is hereby granted pursuant to MCR 2.116(C)(8) and (10).

5. Because Count V (failure to prevent civil rights violations) is wholly dependent on Count IV, Defendants' Motion as to Count V of Plaintiff's Second Amended Complaint is hereby granted pursuant to MCR 2.116(C)(8) and (10).

6. Defendants' Motion as to Count VI (erroneously denominated Count VII) (defamation) of Plaintiff's Second Amended Complaint is hereby granted pursuant to MCR 2.116(C)(10).

7. Having previously dismissed certain Counts of Plaintiff's Complaint and First Amended Complaint on March 15, 1994, with this dismissal of Plaintiff's Second Amended Complaint, the entire case is now dismissed with prejudice.

8. This is the final order of the Court for purposes of appeal.

DATED: December 13, 1994

RONALD J. TAYLOR
RONALD J. TAYLOR,
CIRCUIT JUDGE

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF BERRIEN

RICHARD SULLIVAN,

Plaintiff,

v

RIVER VALLEY SCHOOL BOARD, et al.,

Defendants.

File No. 93-2066-NZ-T

HON. RONALD J. TAYLOR

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ORDER GRANTING PLAINTIFF'S MOTION TO AMEND

At a session of said Court, held in the Circuit Courtrooms, City of St. Joseph, Berrein County, Michigan, on this 13 day of December, 1994.

PRESENT: HONORABLE RONALD J. TAYLOR, Circuit Judge

The Court has considered Plaintiff's Motion to file a Second Amended Complaint, Defendants' Response in Opposition thereto, and heard the arguments of counsel for the parties on November 7, 1994. For the reasons stated by the Court from the bench at that hearing, it is hereby ordered that Plaintiff's Motion to Amend is granted, and his Second Amended Complaint is received for filing with the Court.

RONALD J. TAYLOR 12-13-94
Ronald J. Taylor, Circuit Judge

PREPARED BY:

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF BERRIEN

RICHARD SULLIVAN,

Plaintiff,

v

RIVER VALLEY SCHOOL BOARD, RIVER VALLEY EDUCATION ASSOCIATION, CHARLES O. WILLIAMS, Superintendent of River Valley Schools, PHIL BENDER, President of River Valley Education Association, JANE TEMPLE, GARY B. SOMMERS, PAMELA BEHNKE, DENNIS ZEIGER, RICHARD REITH, VICKIE PAILING, LYNDA VACKAR, and WESLEY LIND, jointly and severally in their individual and official capacities,

Defendants.

File No. 93-2066-NZ-T

Hon. Ronald J. Taylor

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ORDER

At a session of said Court, held in the Circuit Courtroom, for the County of Berrien, State of Michigan, on the 15 day of March, 1994.

PRESENT: HONORABLE RONALD J. TAYLOR

The Court has considered the Motion for Summary Disposition filed by Defendants Bender and the River Valley Education Association, the response of Plaintiff in opposition thereto, and has heard the arguments of counsel in open Court. For the reasons stated by the Court

from the bench at the hearing on this motion on Tuesday, September 7, 1993,

IT IS HEREBY ORDERED:

1. As to Count I of Plaintiff's Complaint, the Association Defendants' Motion for Summary Disposition if [sic] GRANTED, and Count I is DISMISSED with prejudice.

2. As to Count II of Plaintiff's Complaint, as it relates to an interference with contractual relations, the Association Defendants' Motion for Summary Disposition is GRANTED, and that portion of Count II is DISMISSED with prejudice.

3. As to Count II of Plaintiff's Complaint, as it relates to infliction of emotional distress, the Association Defendants' Motion for Summary Disposition is DENIED, but Defendants are granted leave to renew their motion at the conclusion of discovery.

4. As to Count III of Plaintiff's Complaint, the Association Defendants' Motion for Summary Disposition is GRANTED, and Count III is DISMISSED with prejudice.

5. As to Count IV of Plaintiff's Complaint, the Association Defendants' Motion for Summary Disposition is DENIED, but Defendants are granted leave to renew their motion at the conclusion of discovery.

6. As to Count V of Plaintiff's Complaint, the Association Defendants' Motion for Summary Disposition is DENIED, but Defendants are granted leave to renew their motion at the conclusion of discovery.

7. No costs are awarded to any party.

RONALD J. TAYLOR
Ronald J. Taylor
Circuit Court Judge

Drafted by:

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF BERRIEN

RICHARD SULLIVAN,

Plaintiff,

File No. 93-2066-NZ-T

Hon. Ronald J. Taylor

v

RIVER VALLEY SCHOOL BOARD, RIVER VALLEY EDUCATION ASSOCIATION, CHARLES O. WILLIAMS, Superintendent of River Valley Schools, PHIL BENDER, President of River Valley Education Association, JANE TEMPLE, GARY B. SOMMERS, PAMELA BEHNKE, DENNIS ZEIGER, RICHARD RIETH, VICKIE PAILING, LYNDA VACKAR and WESLEY LIND, jointly and severally in their individual and official capacities,

Defendants.

_____/

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ORDER OF DIMISSAL [sic] ON SUMMARY DISPOSITION

_____/

At a session of said court held in the Courthouse of St. Joseph, Michigan on the 16th day of February, 1994.

This matter having come on regularly for hearing before the above referenced court on the motion of Defendants River Valley School Board, Charles O. Williams, Superintendent of River Valley Schools and the individual Board Members to dismiss the Plaintiff's Complaint on summary disposition, the court having read the briefs,

having heard argument of counsel, having reviewed supplemental briefs, and being otherwise fully advised in the premises, it is hereby

ORDERED that Plaintiff's Complaint, and each and every claim therein, against the River Valley School Board, Superintendent Charles O. Williams and Board Members Jane Temple, Gary Sommers, Pamela Behkne [sic], Dennis Zeiger, Richard Rieth, Vickie Pailing, Wesley Lind and Linda Vackar be dismissed in its entirety, with prejudice, for the reasons stated in the written Opinion of the Court dated February 14, 1994, referred to herewith and incorporated hereby.

/s/ Ronald J. Taylor
RONALD J. TAYLOR
CIRCUIT JUDGE
2/16/94

Prepared by:

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Date: 2/15/94

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF BERRIEN

****

RICHARD SULLIVAN, Plaintiff	*	
vs.	*	FILE NO. 93-2066 NZ T
RIVER VALLEY SCHOOL BOARD, RIVER VALLEY EDUCATION ASSOCIATION, CHARLES O. WILLIAMS, Superintendent of River Valley Schools, PHIL BENDER, President of River Valley Education Association, JANE TEMPLE, GARY SOMMERS, PAMELA BEHNKE, DENNIS ZEIGER, RICHARD REITH, VICKIE PAILING, LYNDA VACKAR, and WESLEY LIND, jointly and severally in their individual and official capacities, Defendants.	*	OPINION OF THE COURT

****

This matter is before the Court on Defendant River Valley Board of Education's, its individual members', and Superintendent Charles O. William's (hereinafter referred to collectively as "RVBE" or "Defendants") Motion for Summary Disposition pursuant to MCR 2.116(C)(7), (8),

and (10). The Court has read the briefs, heard argument and reviewed the supplemental briefs filed subsequent to the hearing.

FACTS

Plaintiff is a tenured teacher in his sixteenth year with River Valley Schools. During the 1990-1991 school year, he withdrew from the local teacher's union (also a Defendant herein) after losing a grievance in arbitration. Since that time he has been involved in an ongoing feud with RVBE and the union which has culminated in this lawsuit. This feud can be summarized as follows.

Pursuant to a collective bargaining agreement between the School District and union, non-members are required to pay a representation fee. If this fee is not paid, the agreement requires the School Board to commence termination proceedings. During both the 1991-1992 and 1992-1993 school years, Defendants have initiated such proceedings against Plaintiff. However, before the scheduled hearing date, Plaintiff has paid the fee (promptly according to Plaintiff, after delay and without notice according to Defendants) and the School Board has cancelled the proceedings. In the meantime, the parties traded accusations and counter-accusations, many of which were aired in local newspapers. The growing acrimony between the parties seems to have been fueled by Plaintiffs conviction that the union contract was being illegally applied to him.

Events in 1992-1993 are illustrative. Plaintiff received his fee packets, by which he could calculate a portion of the fee, in November, 1992. He mailed a check (signed

under protest) for this determinable, pro rata portion in late December. The remainder of the fee was to be set by arbitration the following spring. Plaintiff took the position that he was not required to pay the balance until the amount was set by the arbitrator.

In February, the president of the local union, Defendant Bender, wrote to Plaintiff to inform him that the balance was due by March 3. When an inquiry of the Michigan Education Association (MEA) revealed that Plaintiff did not comply, Bender notified the RVBE to begin termination proceedings. RVBE notified Plaintiff that his employment would be terminated at the end of the 1992-1993 school year unless RVBE received written notice of payment from the union before a replacement teacher was employed. As was the case the previous year, Bender instructed Plaintiff to submit the balance to the local union. Plaintiff insisted that he was to tender the fee to the MEA in Lansing pursuant to correspondence from its Director of Membership Services.

The arbitrator's determination of fees was issued on April 21, 1993, and received by Plaintiff on April 24. Plaintiff sent his check to Lansing on the 27th. Defendants insist that Plaintiff never notified the RVBE or local union that he had submitted this fee. Plaintiff's exhibits show that he notified the board of his December payment and his understanding of his obligations as to the balance. Plaintiff has submitted no documentary evidence showing that he notified Defendants that he submitted the remainder following arbitration. Even when Plaintiff was informed that his job would be posted and he demanded a hearing on the charges against him, Defendants insist that Plaintiff failed to mention that one detail

– that he had paid the arbitrated fees to the MEA. The local did check with MEA on June 16 and were informed that Plaintiff did not pay. It seems that his check was held for over eight weeks to get an opinion on an endorsement provision to the effect that Plaintiff was paying under protest. Plaintiff had used similar language on previous checks that had been cashed.

Plaintiff's check was finally credited to his account on June 22, 1993; RVBE cancelled the pretermination hearings scheduled for the 29th and 30th. Plaintiff was never terminated or suspended; he has remained on the faculty with full salary and benefits. RVBE has refused his demand for a name clearing hearing, stating that he is free to speak at any regularly scheduled board meeting.

After reviewing the numerous exhibits submitted, the Court cannot find either side being particularly diplomatic. From the onset Plaintiff concedes he has been "outspoken" in expressing his opinions as to Defendants' ineptitude, and/or sinister conspiracy, to deny him his rights. Plaintiff indicated that Defendants' misdeeds included "secret deals, illegal arguments, disregard of constitutional guidelines, and failure to truly represent the membership." (Letter to "Educators", April 12, 1993).

Defendants did not long remain silent in the face of Plaintiff's criticism; when his complaints reached the public forum they responded in kind. Allegedly disparaging statements were written and read by Defendant Temple at a RVBE meeting, where the statements allegedly were adopted by the board. Temple wrote that Plaintiff's tactics cost the taxpayers more money in increased legal fees. Plaintiff manipulated the issues to meet "personal

objectives", which acts were unprofessional and unethical. He harassed teachers, union officials, administrators and the Board, and misquoted and misrepresented them to the media. In joining the battle, the Board publicly questioned whether Plaintiff's actions indicated a lack of fitness to continue teaching.

When the RVBE refused Plaintiff a name clearing hearing following cancellation of the 1993 pretermination hearing, he filed a five count complaint consisting of: Count I, Defamation; a multi-claim Count II including Intentional Infliction of Mental Anguish and Interference with Contract; Count III, False Light Invasion of Privacy; Count IV, Deprivation of Constitutional and Civil Rights; and Count V, failure to Prevent Count IV under 42 USC Sec. 1986.

I. GOVERNMENTAL IMMUNITY

Defendants have raised the defense of governmental immunity. The Governmental Tort Liability Act, MCLA 691.1401 et seq., MSA 3.996(101) et seq., provides that governmental agencies are immune from tort liability for injuries arising out of the exercise or discharge of a governmental function in the absence of a statutory or common law exception existing before July 1, 1965. MCLA 691.1407(1); MSA 3.96(107)(1). Officers and employees of governmental agencies are immune from liability for injuries "while in the course of employment" if the following conditions are met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the or exercise or discharge of a governmental function.

(c) The officer's, employee's, member's or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. MCLA 691.1407(2), MSA 3.996(107)(2).

Defendants correctly assert that the burden is on the Plaintiff to plead the avoidance of governmental immunity. *Ross v. Consumers Power Co. (on rehearing)*, 420 Mich 567, 621; 363 NW2d 641 (1984).

Each tort count of the complaint alleges that the acts complained of are not "deserving" of governmental immunity. This bald assertion does not meet Plaintiff's burden. In addition, Plaintiff argues that governmental immunity is not a defense to an intentional tort claim, citing *Lockaby v. Wayne County*, 406 Mich 65; 276 NW2d 1 (1976). *Lockaby* preceded both *Ross*, supra, which greatly clarified the law of governmental immunity, and the 1986 amendments to the Act, which made significant changes. The better authority is *Smith v. Department of Public Health*, 428 Mich 540; 410 NW2d 749 (1987), *aff'd sub nom, Will v. Michigan Dept. of State Police*, 491 US 58 (1989). In *Smith*, the Court specifically held that no intentional tort exception exists, and an act may be done in the exercise of a governmental function even though it results in an

intentional tort. *Id.*, 428 Mich at 61.* Plaintiff did not allege Defendants were not engaged in the exercise of a governmental function.

This holding is determinative of the issue of the liability of the School Board as to Counts I, II, and III. Its Motion is granted as to those Counts.

The issue remains as to whether Plaintiff has pled in avoidance of governmental immunity as to the individual Defendants. Defendants have not specifically contested the applicability of conditions (a) and (b) as set forth in MCLA 691.1407(2), acting within the scope of employment or engaged in the exercise or discharge of a governmental function.

Defendants' "axiomatic" assertion that the board members must have been acting individually rather than in their official capacities to be subject to liability is refuted by the plain language of the Act. Not just officers, employees, and volunteers but "each member of a board, council, commission, or statutorily created task force" come within the purview of MCLA 691.1407(2). Defendants have cited no authority that individual action on behalf of the group is not actionable.

The remaining condition is that the members' conduct not amount to gross negligence, defined as "conduct

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*It strikes this Court as incongrous [sic] that the legislature would shield some intentional acts with immunity while excepting seemingly less culpable acts of gross negligence. It has long been recognized that a legislative act "can do no wrong, though it may do several things that may look pretty odd." *City of London v. Wood*, 12 Mod. 669, 687 (1701).

so reckless as to demonstrate a substantial lack of concern for whether injury results" under condition (c). Defendants contend that this standard is synonymous with the last clear chance doctrine. While gross negligence at common law required precedent negligence by the plaintiff, there is no such requirement in the Act.

The statutory definition of gross negligence is closer to the common law definition of willful and wanton conduct. *See generally* Baylor, *Governmental Immunity in Michigan*, Sec. 5.11, pp. 5-15 to 5-16. As there is a lack of caselaw explaining the definition of gross negligence in the Act, caselaw pertaining to willful and wanton misconduct is instructive. Willful and wanton misconduct (as distinguished from ordinary negligence) encompasses acts whereby tortfeasors exhibit an "indifference to harm tantamount to a willingness that it occur." *Montgomery v. DNR*, 172 Mich App 718, 721; 432 NW2d 414 (1988).

The allegations in the complaint relating to intent are as follows:

Count I: Para. 4.A. – Defamatory statements "were made with full knowledge that the statements were false . . . "

Para. 4.C – "None of the Defendants retracted the malicious false and defamatory statements . . . "

Count II: Para. 10 – "All the Defendants acts were malicious, willful and wanton."

Count III: Para.15 – "Defendants acted with malice, with knowledge that their statements were false and in reckless disregard as to the truthfulness or falsity of the matters published".

Plaintiff has not clearly pled negligence under each count; it is arguable that Count I alleges only intentional conduct. However, the same conduct underlies each count. This Court can reasonably anticipate that Plaintiff, if he hasn't pled negligent defamation, would amend his complaint to so plead.

Defendants contend that Plaintiff has merely plead conclusory allegations of gross negligence, failing to set forth sufficient facts to establish a genuine issue and withstand their motion under MCR 2.116(C)(10), relying on *Easley v. University of Michigan*, 178 Mich App 723, 726; 444 NW2d 820 (1989). Plaintiff argues that he has alleged sufficient conduct to support a claim of gross negligence; the reasonableness of an actor's conduct under the established standard is a question of fact. *Tallman v. Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989).

In determining whether there is factual support for a claim, the court must give the benefit of reasonable doubt to the nonmoving party in determining whether a record might be developed which would leave open an issue upon which reasonable minds could differ. *Wolfe v. Employers' Health Ins. Co.*, 194 Mich App 172; 486 NW2d 319 (1992). The Court will review the evidence regarding alleged negligence while applying this standard.

Plaintiff submitted cancelled checks showing that he timely paid the determinable portion of both his 1991-1992 and 1992-1993 fees. Both the MEA cover letter and the Service Fee Election Form clearly state that the pro rata amount then due was to be sent to MEA headquarters, not to the local association. Both documents also state that the non-member would be billed later for the

remainder of the fee. Plaintiff wrote the MEA for verification of this procedure in March, 1992, after Defendant Bender had written him demanding payment to the local Association by March 3. Plaintiff wrote the RVBE on March 19, outlining (with his usual penchant for insults and sarcasm) his understanding of his obligations. One may reasonably infer that Defendants did nothing to verify whether Plaintiff's understanding was correct. On March 9th, the union instituted the termination process with the RVBE, which posted Plaintiff's position and set a date for a pretermination hearing.

The arbitrator issued a decision on April 20, and Plaintiff submitted his payment a week later. In a letter dated April 28, the MEA responded to Plaintiff's inquiries with the following instructions:

> Subsequent billings for any remaining service fee obligation are handled directly by the local. Payments for these amounts are also *to be made directly to the local*, who in turn will reimburse the MEA. (Emphasis added.)

This was far from clear in the earlier MEA materials which Plaintiff relied upon for guidance; to the contrary, one could reasonably conclude that the arbitrator's award, like the earlier pro rata amount, was to be sent to MEA headquarters. However, Plaintiff submitted no evidence that, once he received the April letter, he notified the Defendant that he had sent his payment to the MEA despite writing at least one letter to the RVBE. (Indeed, Plaintiff appears to have acknowledged only those communication which justify his stance, while minimizing or ignoring those that don't. This has continued to be true

even during this litigation; the April 28 letter is conspicuously absent from Plaintiff's exhibits.) Upon learning that Plaintiff's account has been credited on May 13, the union withdrew its complaint for termination by letter dated June 4. The Temple Memo followed on June 22.

Essentially the same scenario played itself out the following year, though the time between when Plaintiff tendered his payment to the MEA and the time when his account was credited stretched out to two months, apparently due to the protestations on the check. The withdrawal of the complaint for termination came approximately a week before the pretermination hearing. Apparently the parties were unable or more likely unwilling, to learn from their experiences in 1992. This Court fails to understand why, after what transpired the previous year, one or both parties would not have verified exactly when and to whom the arbitrated fee was to be paid in 1993, **and shared that information**.

Did RVBE have any duty in this regard? This is key to the issue of Defendants' intent. According to Article II of the collective bargaining agreement,

> [The] Board, upon receiving a written and signed complaint from the Association indicating a teacher has failed to comply with (the dues/fee requirement), *shall process said complaint to effectuate the termination of the teacher's employment*. (Emphasis added.)

Thus the Board is given no discretion in determining whether the complaint is meritorious. This is determined

solely by the Association prior to the pretermination hearing.**

Plaintiff was understandably confused (at least in 1992) by the MEA's instructions and by the local union's bill for a fee that was not yet arbitrated. Much of his barking, however, was directed up the wrong tree. These Defendants' hands were tied until the complaint was withdrawn.

Under these circumstances, this Court would have difficulty finding even ordinary negligent acts by Defendants. A reasonable juror could not find that Defendants' actions were willful and wanton, or that their statements were made with a reckless disregard of their truthfulness or falsity, or were so reckless as to demonstrate a substantial lack of concern for whether injury would result. Prior to the hearing, they were entitled, even mandated, to act on the union's complaint. When Plaintiff attacked them for so doing, they responded through the Temple Memo with their version of events as they believed them to be. Defendants' conduct does not approach gross negligence as defined in the Act. Therefore, Counts I, II, and III, sounding in tort, are dismissed as to these individual Defendants pursuant to MCR 2.116(c)(7).

**Even giving Plaintiff the benefit of all reasonable doubt, this Court cannot say that the association acted improperly in filing the complaint. Its fee procedures have been upheld in the federal courts. *Lehnert v. Ferris faculty Assoc.*, 707 FSupp 1490 (WD MI 1989), *aff'd*, 893 F2d 111 (6 cir. 1989), *cert. denied*, 496 US 905 (1990).

II. FAILURE TO STATE A CLAIM: COUNTS I – III

Even if governmental immunity did not bar Plaintiff's tort claims, this Court would dismiss Counts I – III for failure to state a claim pursuant to MCR 2.116(c)(8) and/or (c)(10). No factual development could possibly justify a right to recovery for the reasons that follow.

A. Defamation

As to Count I, Plaintiff cannot show that many of the allegedly defamatory statements are false. For example, Plaintiff disputes the Temple Memo's statement that Plaintiff "made no attempt to notify or verify such evidence (of payment) to the board." He cites his March 19, 1992 letter. However, this letter notified the board only of Plaintiff's payment of the earlier, pro rata portion, not the fee which was yet to be arbitrated. As stated earlier, Plaintiff has submitted no evidence that he notified Defendants when he made this payment.

As to statements regarding the untimeliness of the latter payment, such statements were also accurate, even if the untimeliness was due to Plaintiff's understandable confusion over proper procedure.

Plaintiff has submitted no evidence that the fee was not due until after arbitration, only his belief that it should not be. The evidence showed that he was instructed to send the initial payment to the MEA, the payment would be escrowed, and he would be billed for the balance. His 1992 fee became due March 3 upon his being billed by the local on February 18, as documented in the April 28 letter from the MEA. Whether or not Plaintiff understood this

to be proper or reasonable, his failure to pay until after the arbitration, rather than submit his fee to be placed in escrow, made the fee late under Defendants' procedures.

As to the remaining statements referring to Plaintiff as unprofessional and unethical: whether or not they are defamatory (the Court need not rule on this issue and thus declines to do so) they are protected by at least a qualified privilege. Generally, a qualified privilege extends to all good faith communications, upon any subject matter in which the party has an interest or in reference to which he or she has a duty, to a person having a corresponding interest or duty. *Swenson-Davis v. Martel*, 135 Mich App 632, 636; 354 NW2d 288 (1984). This privilege has been held applicable to school business, both in the context of parent – teacher (*Swenson-Davis*, supra) and school board – teacher relations (*Brunn v. Weiss*, 32 Mich App 428; 188 NW2d 904 (1971).

Teacher payment of representation fees is a subject in which RVBE has both an interest and a duty. As demonstrated in the analysis of the gross negligence claim, Plaintiff has failed to make a showing of malice sufficient to create an issue of fact regarding the applicability of the privilege.

B. Intentional Infliction of Emotional Distress

Plaintiff lacks at least two elements of this cause of action. The conduct complained of falls far short of being extreme, outrageous, intolerable, or beyond all possible bounds of decency. Further, he has made no showing that he suffered the requisite emotional distress. *Ledl v. Quick*

Pick Stores, 133 Mich App 583, 590-591; 349 NW2d 529 (1984).

C. Interference With Contract

Plaintiff again lacks at least two elements of this cause of action. First, it lies only against a third party interferer, not a party to the contract. Second, there must be a breach of the contract. *Dzierwa v. Michigan Oil Co.*, 152 Mich App 281, 287; 393 NW2d 610 (1986); *Prior v Sloan Valve Co.*, 194 Mich App 556, 560; 487 NW2d 846 (1992). RVBE is a party to Plaintiff's teaching contract. Plaintiff remains employed, with no loss of salary, benefits, or seniority. Thus there has been no breach.

D. False Light Invasion of Privacy

This tort consists of a communication to the public in general which places the plaintiff in a false light. *Ledl*, 133 Mich App at 591-592. To be actionable, the publicity must be unreasonable and highly objectionable. *Dzierwa*, 152 Mich App at 288.

The truth or falsity issue has been discussed above. The statements were made in a public forum and eventually published in newspapers; thus they were, directly or indirectly, communicated to the general public. Were they unreasonable or highly objectionable? They were not, in light of the course of conduct between the parties, such as: Plaintiff choosing to ignore the April 28, 1992, MEA letter; his failure to notify Defendants when he paid the arbitrated fee; the confrontational and accusatory stance taken in his own communications. After Plaintiff has

chosen to take off his gloves and engage in a street brawl, this Court will not sustain his cries of "foul" when his own nose gets bloodied. Whether or not Defendant's statements were 100% accurate, this Court finds that, as a matter of law, they were not unreasonable or highly objectionable under the circumstances.

III. CONSTITUTIONAL CLAIMS

Count IV alleges that, pursuant to 42 USC Sec.'s 1983 and 1986, Defendants deprived Plaintiff of free speech, due process, and equal protection rights under the First, Fifth and Fourteenth Amendments to the US Constitution, and Article I, Sec.'s 2 and 5 of the Michigan Constitution. Count V alleges that Defendants failed to prevent Count IV in violation of 42 USC Sec. 1986.

A. Free Speech

For the speech of a public employee to be constitutionally protected, it must involve a matter of public concern. *Connick v. Meyer*, 461 US 138; 75 LEd2d 708, 720; 103 SCt 1684 (1983). Government officials must be given the same latitude in managing their offices as private employers, free from interference from the judiciary under the guise of First Amendment rights. *Id.*, 75 LEd2d at 719. Whether speech is of public or private concern is a question of law, not fact. *Id.* at 720, ft. 7.

The parties difficulties began over Plaintiff's application for a coaching position. When he lost in arbitration and withdrew from the union, the dispute began over whether or not he was obligated to pay representation

fees based on his date of hire. This carried over into the focus of this litigation: when and to whom he was to submit those fees. These are matters of private concern between these parties rather than between Defendants and the River Valley teachers in general. Plaintiff cannot make it otherwise by accusations of misconduct, illegal deals, or "fingers in the cookie jar." If Plaintiff were to be wrongfully discharged or otherwise punished, he would be entitled to pursue the remedies available to all employees to redress these wrongs.

This leads to another deficiency in this claim. Plaintiff has failed to make a showing that he has been punished for the exercise of his rights. As discussed earlier, he retained his teaching position with no loss of benefits. RVBE's initiation of termination proceedings was not punishment on its part, but rather its obligation under the collective bargaining agreement. The Court views the posting of Plaintiff's position as nothing more sinister than Defendants protecting themselves against being understaffed in the event that they became obligated to discharge him subsequent to the hearing. The Court does not find any evidence that this posting was published excessively.

B. Due Process

Plaintiff next claims that Defendants have damaged his property interest in his profession and denied him a name clearing hearing without due process of law. As Plaintiff has lost no interest in the teaching position itself, the only interest implicated is his professional reputation.

Reputation alone, apart from some more tangible interest such as employment, is not a property interest sufficient to invoke due process protections. *Paul v. Davis*, 424 US 693; 47 LEd 2d 405, 414; 96 SCt 1155 (1976). To establish a claim under Sec. 1983 and the Fourteenth Amendment, the defamation has to occur in the course of termination of employment. "(T)here is no suggestion . . . that a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee *who continues to be an employee.*" (Emphasis added.) *Id.*, 47 LEd2d at 419. The Michigan Court of Appeals recently cited *Paul* for this proposition in *Mollet v. Taylor*, 197 Mich App 328, 343; 494 NW2d 832 (1992).

Plaintiff has cited no authority whatsoever to support his contention that he is entitled to a name clearing hearing; thus he has failed to state a cause of action for violation of his due process rights. (The Court would also note that apparently Plaintiff has chosen not to avail himself of other avenues available to redress the perceived damage to his reputation, e.g. airing his concerns at a regularly scheduled board meeting.)

C. Equal Protection

Plaintiffs equal protection claim fails as he has made no showing that he was treated differently than other similarly situated individuals. *Molter v. Treasury Dept.*, 193 Mich App 421, 428; 484 NW2d 702, *lv granted on other grounds*, 441 Mich 878; 491 NW2d 571 (1992).

D. Other

As Plaintiff has not established that Defendants deprived him of any constitutional rights, he has necessarily failed to state a claim for either a conspiracy to so deprive him or failure to prevent such a deprivation pursuant to 42 USC Sec. 1986.

Accordingly, defendant RVBE's Motion for Summary Disposition is granted pursuant to MCR 2.116(c)(7), (8) and (10) as to all counts of the complaint. Defendants shall prepare an order dismissing the complaint against them, which incorporates this opinion by reference, and submit it to the Court for its signature within fourteen (14) days of entry.

Dated: February 14, 1994 /s/ Ronald J. Taylor
RONALD J. TAYLOR
CIRCUIT JUDGE

Order

Entered: June 29, 1999

113594

Michigan Supreme Court
Lansing, Michigan

Elizabeth A. Weaver,
Chief Justice

James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.,
Justices

RICHARD SULLIVAN,

Plaintiff-Appellant,

v

RIVER VALLEY SCHOOL BOARD, RIVER VALLEY EDUCATION ASSOCIATION, CHARLES O. WILLIAMS, Superintendent of River Valley Schools, PHIL BENDER, President of River Valley Education Association, JANE TEMPLE, GARY B. SOMMERS, PAMELA BEHNKE, DENNIS ZEIGER, RICHARD RIETH, VICKIE PAILING, LYNDA VACKAR and WESLEY LIND, in their individual and official capacities,

Defendants-Appellees.

SC: 113594
COA: 181913
Berrien
CC: 93-002066-NZ

On order of the Court, the application for leave to appeal from the November 6, 1998 decision of the Court

of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

(SEAL)

June 29, 1999 /s/ Corbin R. Davis

Clerk